

Protest of

JOHN F. TYRA

Solicitation No. 483-198-91

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Date: November 21, 1991

P.S. Protest No. 91-79

DECISION

Mr. John F. Tyra protests the determination of the Manager of the Detroit Transportation Management Service Center (TMSC) that he is a nonresponsible prospective contractor under solicitation No. 483-198-91 for contract highway transportation of mail between Detroit and Belleville, MI. Mr. Tyra was the low bidder under the solicitation, which closed on September 5, 1991. The solicitation requires the contractor to provide three round trips daily except on Sundays and certain specified holidays, plus an additional round trip on Mondays except Monday holidays. As the required stops on the route vary from trip to trip, the estimated one-way length of the route ranges from 26 to 78.6 miles. The annual mileage for the route is approximately 98,000 miles. The solicitation also requires the contractor to furnish two 20-foot straight trucks.

The contracting officer's determination of nonresponsibility was based on a finding that Mr. Tyra lacked the necessary experience to operate a route of the complexity of this one. Specifically, the contracting officer noted that Mr. Tyra has never operated a Postal Service transportation contract or had experience in similar transportation services. He further noted that Mr. Tyra had not provided a plan for obtaining the services of personnel with the requisite operating experience.

Mr. Tyra makes the following points in his protest:

1. He has held the position of head of shipping and receiving for Fabrican Products in River Rouge, MI for more than 20 years. In that capacity he dealt with Fabrican's own trucks as well as those of many other trucking firms.
2. He knows of others who hold Postal Service transportation contracts who do not run them personally.
3. He has the money and the people to do a good job.

4. He is a person of good character and has references from people in the community.

5. He believes, based on past experience with this contracting officer, that the contracting officer is discriminating against him because of his age.

The contracting officer's comments may be summarized as follows:

1. Mr. Tyra was requested to verify his bid because of the hourly rate shown on his worksheet for wages was below the minimum wage required under the Service Contract Act. Mr. Tyra agreed that he was short on the wage amounts, and stated that he would reduce the hired driver hours by driving more of the hours himself. The contracting officer concluded from this that Mr. Tyra did not understand the requirements of the Service Contract Act, and had no experience supervising employees in a transportation operation.

2. Mr. Tyra's experience as head of shipping and receiving at Fabrican was not of the type needed to operate a Postal Service highway contract route. The contracting officer noted that Mr. Tyra had no experience in the hiring and supervision of drivers, preparing payrolls and complying with Department of Labor and Department of Transportation regulations. He further observed that Mr. Tyra had not proposed an adequate plan to acquire the necessary experience and management.

3. While it is true that there are Postal Service transportation contracts which the contractor does not personally run, Mr. Tyra's statement at the pre-award meeting that he would personally perform some of the service was contradicted by his son, whom Mr. Tyra proposed to use as the primary driver and supervisor on the route, and who, in a subsequent telephone conversation, stated that his father would not be doing any of the driving. The contracting officer concludes from these contradictory statements that Mr. Tyra had no definite plan of operation.

4. The contracting officer describes the route as important and complex, serving six large post offices with 45 carrier routes which depend on timely performance by the contractor. He states that if the consequences of failure were less great he would be more inclined to consider an inexperienced operator.

5. There is no evidence that Mr. Tyra has successfully performed transportation service similar to that required by the solicitation. The contracting officer further notes that Mr. Tyra has been awarded a Postal Service transportation contract which was terminated for default in 1987 when Mr. Tyra failed to begin operation. Although the default is more than one year old, it underlines the contracting officer's concern about Mr. Tyra's lack of prior, successful experience in meeting contractual commitments.

6. Mr. Tyra's allegations concerning his finances, his character and his age were "not a factor in the non-responsibility determination."

Discussion

The legal standard by which this office reviews a contracting officer's determination that an offeror is nonresponsible is well settled:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We well recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; see Lock Corporation of America, P.S. Protest No. 89-14, March 10, 1989; Marshall D. Epps, P.S. Protest No. 88-47, September 15, 1988; Cardinal Glove Company, Inc., P.S. Protest No. 89-84, November 14, 1989.

PM Section 3.3.1 a. sets forth general standards for determining whether a prospective contractor is responsible, as follows:

Contracts may be awarded only to responsible prospective contractors. The award of a contract based on price alone can be false economy if there is subsequent default, late delivery, or other unsatisfactory performance. To qualify for award, a prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

In order to be determined responsible, a contractor must have a good performance record (PM 3.3.1 b.3.), and the necessary organization, experience and technical skills, or the ability to obtain them. PM 3.3.1 b.5. "In the absence of information clearly showing that a prospective contractor meets applicable standards of responsibility, the contracting officer must make a written determination of nonresponsibility." PM 3.3.1 e.1.

We find that the contracting officer's determination of nonresponsibility in this case was not arbitrary or capricious, and was reasonably based on substantial information. We will not substitute our views for the contracting officer's technical judgment that Mr. Tyra's managerial experience in shipping and receiving is insufficient in itself for managing a trucking operation. See Illinois Lock Company, P.S. Protest No. 89-35, September 26, 1989; Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985; Hi-Line Machine, Inc. and Gardner Industries, Inc., P.S. Protest No. 85-6, March 7, 1985. See also Ray Angelini, Inc., P.S. Protest No. 89-58, October 24, 1989, in which we found justified a contracting officer's determination that the protester, although a very good electrical contractor, did not have sufficient successful experience as a general contractor responsible for coordinating the mechanical, plumbing and other trades required under a contract for building renovations.

We find that Mr. Tyra's statements at the pre-award meeting, together with those of his

son, are a sufficient basis for the contracting officer to conclude that Mr. Tyra lacked an effective plan for operating the route, and that he did not adequately understand the requirements of the contract and applicable laws and regulations, particularly the Service Contract Act.

Mr. Tyra's 1987 default termination is, as the contracting officer acknowledges, too remote in time to serve as a basis for present nonresponsibility. The contracting officer, however, aware of the previous default, may properly consider it a circumstance requiring a heightened degree of inquiry into a bidder's present ability to perform. Don L. Peterson, P.S. Protest No. 87-03, February 25, 1987.

Our bid protest regulations limit our jurisdiction to "protests against Postal Service contracting procedures and awards." PM 4.5.1. Mr. Tyra's assertion of age bias is outside the scope of our bid protest function. See Fred Austin Trucking, Inc., P.S. Protest No. 86-66, December 10, 1986. We note, however, that the allegation is unsupported by any factual evidence. Mere supposition is considered insufficient to overcome the presumption of regularity attending a contracting officer's performance of his official duties. E.H.O. Trucking, P.S. Protest No. 91-28, June 24, 1991; Penny H. Clusker, P.S. Protest No. 80-37, August 27, 1980.

The protest is denied.

[Signed]

William J. Jones
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Office of Contracts and Property Law

[Compared to original 5/17/95 WJJ]